Supreme Court, U.S.
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No. 91-27

In the Supreme Court of the United States

OCTOBER TERM, 1991

ARCH A. MOORE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in finding that petitioner failed to show, as required by Fed. R. Crim. P. 32(d), that there was a "fair and just reason" to withdraw his guilty pleas.

2. Whether the government breached its undertaking, as part of the plea agreement, not to recommend a "specific sentence."

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 931 F.2d 245.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 1991, and rehearing was denied on May 16, 1991. The petition for a writ of certiorari was filed on July 2, 1991. The jurisdiction of this Court rests on 28 U.S.C. 1254.

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Southern District of West Virginia to mail fraud (18 U.S.C. 1341), extortion under color of official right (18 U.S.C. 1951), two counts of filing a false income tax return (26 U.S.C. 7206(1)), and obstruction of justice (18 U.S.C. 1503). The district court sentenced petitioner to a total of five years' imprisonment on the first four counts, consecutive to a 10-month prison term on the obstruction of justice count. In addition, the court imposed fines totalling $170,000. The court of appeals affirmed. Pet. App. A1-A8.

1. Petitioner is the former Governor of West Virginia. On April 12, 1990, he entered into a written plea agreement in which he agreed to plead guilty to a five-count federal indictment. He formally entered guilty pleas in court on May 8, 1990.

The indictment to which petitioner pleaded guilty consisted of 21 pages and set forth the charges in detail. Briefly, Count 1 charged that petitioner defrauded West Virginia and its citizens by using the United States mails to file false and fraudulent campaign reports that failed to disclose his receipt and expenditure of at least $100,000 in cash during the 1984 election campaign. C.A. App. 12-17. Count 2 charged that, after petitioner's 1984 election as Governor, he extorted $573,000 from a West Virginia coal mine operator in exchange for helping the operator obtain refunds of more than $2 million from the State's Black Lung Fund. *Id.* at 18-22. Counts 3 and 4 charged that petitioner's 1984 and 1985 federal tax returns falsely failed to report a total of at least $72,500 that petitioner received as income in those years. *Id.* at 23-24. Finally, Count 5 charged that petitioner obstructed a federal grand jury investigation in 1989 and 1990 by providing false in-

formation, falsifying documents, and instructing other witnesses to testify falsely. *Id.* at 25-32.

Prior to accepting the guilty pleas, the court summarized the indictment, and ascertained that petitioner understood the charges and wished to plead guilty to each count. C.A. App. 42-47. The court further made inquiry of petitioner, under oath and pursuant to Fed. R. Crim. P. 11, to determine that he understood the maximum penalties for each count, C.A. App. 49-52, and that he understood his right to trial by jury and the various other rights he was waiving by pleading guilty, *id.* at 53-54. Petitioner indicated that he understood his rights and stated that he was pleading guilty freely and voluntarily, because he was in fact guilty of the charges in the indictment. *Id.* at 55, 58-59. The government then described the underlying facts, *id.* at 61-67, and both petitioner and his counsel agreed that the government's recitation was "substantially correct," *id.* at 68.

2. On June 19, 1990, more than two months after the plea agreement was signed and six weeks after petitioner formally entered his guilty pleas in court, petitioner's counsel advised the court that petitioner wished to withdraw the pleas. A motion to withdraw the pleas was filed on June 28, 1990, and the court heard argument on it on July 9, 1990.

At the time of the hearing, the court had before it two affidavits from petitioner's counsel regarding the events leading to the guilty plea. Pet. App. A46-A49, A50-A54. Those affidavits stated that between January and April 1990 counsel had participated in several meetings with the prosecutors and had twice allowed petitioner to be interviewed regarding events underlying the then-ongoing federal investigation. On April 11, 1990, the prosecutors allowed defense counsel to listen to certain incriminating tapes involving petitioner's obstruction of justice, and

informed counsel they were prepared to seek a multi-count indictment of petitioner. The prosecutors offered, however, to enter into an agreement in which petitioner would plead guilty to only five counts. The prosecutors told counsel that petitioner would have to accept the agreement no later than the morning of April 12, rather than April 13, as counsel had requested. While petitioner expressed "reservations" to counsel regarding four of the five counts, counsel "strongly advised" petitioner to accept the agreement after the government agreed to structure it so that only the fifth count, involving petitioner's obstruction of justice, would be subject to the federal Sentencing Guidelines. Counsel told petitioner he "was not happy with the plea agreement, but it was clearly the lesser of the two evils from which we had to choose." Petitioner signed the agreement on April 12, 1990. Pet. App. A47, A51-A52.

Defense counsel's affidavits further stated that petitioner balked at the government's version of the facts after he signed the plea agreement. Pet. App. A52-A53. When, following his entry of the guilty pleas and as the presentence report was being prepared, petitioner refused to accept responsibility for the crimes, counsel advised him to consider whether to seek to withdraw his guilty pleas. *Id.* at A53-A54.

3. The district court denied petitioner's motion to withdraw his guilty pleas. The court concluded that "[t]here is no fair and just reason why I should permit now the withdrawal of the pleas of guilty which were made voluntarily under oath." Pet. App. A42. Petitioner was sentenced the next day.

4. The court of appeals affirmed. Pet. App. A1-A8. The court held that, under Fed. R. Crim. P. 32(d), a defendant bears the burden of demonstrating a "fair and just reason" for withdrawing his guilty plea and that the determination whether the defendant has carried that burden

"is entrusted to the discretion of the district court." Pet. App. A3-A4. Examining the particular facts of this case, the court of appeals concluded that the district court had not abused its discretion. The court emphasized that "[f]irst and most importantly, [petitioner], a lawyer and former governor assisted by competent counsel, was simply not convincing in claiming that the Rule 11 plea was not knowing and voluntary." Pet. App. A4. The court further noted that petitioner "never made credible assertions of his innocence," there was a "long delay[ ]" between the entry of the pleas and the motion to withdraw, defense counsel competently represented petitioner, and "a reopening of the plea would have been futile." *Id.* at A4-A5. While the court did not believe the prosecution would suffer any real prejudice if the plea were withdrawn, the court explained that the controlling "factors are only balancing considerations, and so the lack of prejudice to the government, in and of itself, is not dispositive." *Id.* at A5.

The court of appeals also rejected petitioner's claim that the government had violated the terms of the plea agreement at the sentencing hearing. The agreement stated that the government would "make no recommendation as to a specific sentence," but could "address the Court with respect to the nature and seriousness of the offense." Pet. App. A8. At the sentencing hearing, the government sought "a sentence that deters future public officials." *Id.* at A106. The court of appeals held that the prosecutor had not breached the plea agreement, since no "specific sentence" had been recommended. *Id.* at A7-A8.

ARGUMENT

The court of appeals correctly applied the law in holding that the district court acted within its discretion in not allowing petitioner to withdraw his guilty pleas. Peti-

tioner's fact-specific claim to the contrary and his claim that the prosecutor violated the terms of the plea agreement do not warrant further review.

1. Fed. R. Crim. P. 32(d) allows withdrawal of a guilty plea "upon a showing by the defendant of any fair and just reason." Consistent with the rule's plain language, the federal courts of appeals consistently have held that a defendant bears the burden of showing a fair and just reason for withdrawing his guilty plea. See, *e.g.*, *United States* v. *Allard*, 926 F.2d 1237, 1243 (1st Cir. 1991); *United States* v. *Rhodes*, 913 F.2d 839, 845 (10th Cir. 1990), cert. denied, 111 S. Ct. 1079 (1991); *United States* v. *Hurtado*, 846 F.2d 995, 997 (5th Cir.), cert. denied, 488 U.S. 863 (1988); *United States* v. *Ray*, 828 F.2d 399, 422 (7th Cir. 1987), cert. denied, 484 U.S. 1045 (1988). Moreover, a district court's decision denying leave to withdraw a guilty plea is reviewed under a deferential abuse of discretion standard. See, *e.g.*, *United States* v. *Clark*, 931 F.2d 292, 294 (5th Cir. 1991); *United States* v. *Scott*, 929 F.2d 313, 315 (7th Cir. 1991); *United States* v. *Goldberg*, 862 F.2d 101, 104 (6th Cir. 1988).

The court of appeals correctly held that the district court did not abuse its discretion in concluding that petitioner failed to carry his burden of demonstrating a fair and just reason for withdrawing his pleas. The court balanced various factors considered in prior cases and concluded that the only factor that seemed to tilt in petitioner's favor was that the government had not shown that it would be prejudiced if the pleas were withdrawn. The court concluded that a number of factors weighed against allowing petitioner to withdraw his pleas, including the fact that petitioner is a sophisticated litigant who entered into a plea agreement with the assistance of able counsel and had offered no justification for withdrawal of the pleas. Pet. App. A4-A5. In those circumstances, the court

of appeals properly held that the district court did not abuse its discretion. See *United States* v. *Hurtado*, 846 F.2d at 997 (defendant "argues that withdrawal would not have prejudiced the Government, but that fact alone does not mandate permission to withdraw a plea when, as here, no credible reason is proffered") (internal quotations omitted).

Totally without merit is petitioner's suggestion (Pet. 5) that "the Fourth Circuit and District Court applied two improper standards which make it virtually impossible for a plea ever to be withdrawn." Petitioner's first claim, that the courts below "held that a showing of fraud was necessary before a plea could be withdrawn," *ibid.*, lacks any basis in the record. The court of appeals, which carefully balanced several factors in determining that petitioner set forth no good reason for withdrawing his plea, never even mentioned fraud and certainly never held it to be the only basis for withdrawing a guilty plea. And, while the district court did suggest in a give-and-take colloquy with defense counsel that fraud was one possible basis for withdrawing a guilty plea (Pet. App. A31), that court never held that fraud is the exclusive basis for withdrawal.

Similarly insupportable is petitioner's suggestion (Pet. 5) that the courts below "rationalized their decision not to grant an evidentiary hearing on the ground that, because Petitioner's plea was entered following an inquiry under Rule 11 of the Federal Rules of Criminal Procedure, Petitioner should not be entitled to testify because he could face a charge of making a false statement." The court of appeals' opinion nowhere states that petitioner could not have testified at an evidentiary hearing because it would have been necessary for him to contradict representations that he made during the Rule 11 plea proceedings. In any event, there would have been no error in emphasizing that representations made during a Rule 11 plea hearing

should, absent some compelling circumstance not present here, be binding. See Advisory Committee Note to 1983 Amendment to Rule 32(d) ("Given the great care with which pleas are taken under this revised Rule 11, there is no reason to view pleas so taken as merely 'tentative,' subject to withdrawal before sentence whenever the government cannot establish prejudice"). In *United States* v. *Scott, supra,* for example, the court stated that "voluntary responses made by a defendant under oath when entering a guilty plea [should] be binding," 929 F.2d at 315 (internal quotations and brackets omitted), and held that "[t]o allow Scott to withdraw his plea because of secret expectations that he harbored in the face of his directly contradictory sworn testimony would undermine the strong societal interest in the finality of guilty pleas," *ibid.* Cf. *United States* v. *Clark,* 931 F.2d at 294 (in upholding the denial of a request to withdraw a guilty plea, the court noted that the defendant "did plead guilty under oath to a federal district judge").

2. Petitioner also claims (Pet. 7-8) that he should have been allowed to withdraw his pleas because, in orally urging the court to impose a sentence that "deters future public officials and directly punishes the defendant for his crime" and that "send[s] a clear and unequivocal message" (Pet. App. A106, A107), the prosecutor breached the plea agreement. That agreement provided that "the United States will make no recommendation as to a specific sentence," but that it "retain[s] the right to inform the probation office and the Court of any relevant facts, [and] to address the Court with respect to the nature and seriousness of the offense." Pet. App. A58. The district judge, to whom the sentencing remarks were directed, observed that the prosecutor had "not made a specific recommendation as to a specific sentence." *Id.* at

A108.* In affirming this conclusion, the court of appeals adopted a straightforward interpretation of the plea agreement which had been negotiated by "very able" defense counsel and signed by a sophisticated defendant. The court properly concluded that petitioner "did not have a reasonable basis to believe that the prosecutor's promise to refrain from recommending a *specific* sentence protected him from remarks calculated to induce the Court to issue a *severe* prison term." *Id.* at A8.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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* By quoting the court's initial remark but not its conclusions (see Pet. 7), petitioner incorrectly suggests that the district court found a breach of the agreement.

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